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Vae Nortrak North America, Inc. and United Steelworkers of America, Local 3405. Case 27–CA–18917–1

February 4, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

On August 31, 2004, Administrative Law Judge James L. Rose issued the attached decision. The Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings,² findings,³ and conclusions and to adopt the judge's recommended Order dismissing the complaint.

¹ The Charging Party has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² The judge did not apply the framework for analysis of a refusal-to-hire case that the Board set forth in *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002). Although the judge applied slightly different standards in assessing the General Counsel's case, we nevertheless find that his analysis comports with that of *FES*, and that the General Counsel has failed to meet his burden of proof under the *FES* standards. See, e.g., *ITT Federal Services Corp.*, 335 NLRB 998, 999 fn. 4 (2004).

³ The judge apparently resolved credibility disputes in favor of the Respondent's witnesses. Contrary to our colleague, we find it unnecessary to resolve any ambiguities in the judge's credibility determinations because we find that the General Counsel has not met his burden of proving, pursuant to *FES*, supra, that antiunion animus contributed to the decision not to hire Sam Pantello. Had the judge credited the testimony of the General Counsel's witnesses, the testimony demonstrated antiunion animus attributable only to Plant Manager Craig Fetty. The record clearly indicates, however, that Fetty was not responsible for the decision not to hire Pantello, nor did he take any part in that decision. Indeed, Fetty was not employed by the Respondent at the time the decision was made. Under these circumstances, we agree with the judge that any antiunion animus attributed to Fetty would not have motivated the hiring decision as he had no part in it. See, e.g., *JS Mechanical, Inc.*, 341 NLRB No. 46, slip op. at 2 fn. 7 (2004).

Member Liebman agrees with the judge that the General Counsel has failed to meet his initial burden under *FES*, supra, of showing that union animus contributed to the Respondent's decision not to hire alleged discriminatee Pantello. She relies solely on the judge's credibility resolutions in favor of the Respondent's witnesses. She disagrees with her colleagues' finding that, even if the judge had credited the General Counsel's witnesses, any union animus consequently attributed to Plant Manager Fetty against Pantello would not be imputable to Human Resources Director Dillard, who made the final decision not to hire Pantello.

ORDER

The complaint is dismissed in its entirety.
Dated, Washington, D.C. February 4, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Donald E. Chavez, Esq., for the General Counsel.
Elmer E. White, Esq., of Birmingham, Alabama, for the Respondent.
Stanley M. Gosch, Esq., of Denver, Colorado, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Pueblo, Colorado, on July 20, 2004,¹ upon the General Counsel's complaint which alleged that [on] January 14, the Respondent refused to hire Sam Pantello in violation of Section 8(a)(3) of the National Labor Relations Act.

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that it did not hire Pantello for good cause and not in violation of the Act.

Upon the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following findings of fact, conclusions of law, and recommended order.

I. JURISDICTION

Vae Nortrak North America, Inc. (the Respondent or Nortrak) is a Wyoming corporation engaged in the business of manufacturing rails and various associated products for sale to customers in the railroad industry, with a facility at Pueblo, Colorado. In the conduct of this business, the Respondent will purchase and receive at its Pueblo facility, goods, products, and materials valued in excess of \$50,000 directly from points outside the State of Colorado. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Section 2(2), 2(6), and 2(7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Charging Party, United Steelworkers of America, Local 3405 (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

¹ All dates are in 2004, unless otherwise indicated.

A. The Facts

In 2003, Nortrak began the process of acquiring the assets of Meridian Rail Corporation of Pueblo, Colorado. Preliminary to the acquisition, in early to mid-November, three members of Nortrak management made an inspection trip to Pueblo, one of whom was Jeffery Clay Johnson, the Respondent's human resources manager. Johnson's job was to inspect, check serial numbers, and photograph the equipment, to insure that in fact Meridian's machines were as stated. He was not to have any interchange with Meridian employees nor was he to tell them what he was about (though this would seem to have been obvious).

Craig Fetty, Meridian's plant manager (who was subsequently hired by the Respondent in that position) took Johnson on an orientation walk through the plant, and then Johnson was on his own to do his inspection. While doing this, according to Johnson, Pantello, whom he did not know, approached him in a confrontational manner and said, "Who the hell are you?" "What are you doing?" "What are the pictures for?" While Pantello agrees that he had a discussion with Johnson, he denied that he was in any way rude or confrontational. In fact Pantello testified that he offered to help get a serial number off his machine and had been introduced to Johnson and the other two Nortrak managers by Fetty. Pantello testified that he even suggested an Italian restaurant to them for dinner that evening which, assertions were denied by Johnson and Fetty.

In December 2003, the Respondent was about to acquire Meridian and thus began the process of interviewing applicants (off premises) and making decisions as to whom to send offer letters. At some point, Johnson told Robert Dillard, the director of human resources for Pueblo (and two other plants), about his perception of the incident with Pantello and suggested that Pantello was not the sort of person the Respondent wanted as an employee. Though Dillard interviewed Pantello, he had predetermined not to offer him a job and did not.

According to Dillard, the Respondent hired a total of 62 bargaining unit employees (whereas Meridian had 75 or 76) all but 8 of whom had worked for Meridian. During this process, Dillard had received applications from 80 plus individuals who had not worked for Meridian but he interviewed only 15. Dillard testified that a couple of Meridian employees he interviewed were hostile and he declined to offer them jobs. He did agree that Pantello was not hostile during the interview.

Pantello had worked for Meridian and its predecessors 29 years and, as far as the Respondent knew, was a competent employee. He was also the Union's president, and had been for 12 years. It was because of his position, the General Counsel alleges, that he was not hired. The Respondent contends that the only reason he was not hired was its evaluation of him based on the confrontation with Johnson.

Since acquiring Meridian, the Respondent has recognized the Union and they have been in negotiations for a collective-bargaining agreement, inasmuch as a substantial majority of the bargaining unit employees had worked for Meridian, and for many years its predecessors, had recognized the Union. Where the parties are in negotiations is not in this record.

B. Analysis and Concluding Findings

As a general proposition, when one company acquires the assets of another, it is not required to hire the predecessor's employees. However, the successor company may not lawfully deny a job offer because of the employee's activity on behalf of a labor organization. E.g., *Howard Johnson Co. v. Hotel & Restaurant Employees*, 417 U.S. 249 (1974). And, whether the refusal to hire an individual is unlawful is controlled by *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), which requires the General Counsel to establish a *prima facie* case of discrimination based on the employer's knowledge of union activity and evidence of union animus. Then the burden of going forward shifts to employer to show that the same hiring decision would have been made even in the absence of union activity.

The refusal to offer Pantello a job is alleged to have been because of his union activity—specifically, that he was the Union's president. The General Counsel argues that the Respondent's stated reason for not hiring Pantello must necessarily have been a pretext, since the critical event relied on by the Respondent did not happen as testified to by Johnson, or, at any event, it was too trivial to deny employment to an experienced, competent employee. Therefore, the true reason must have been the fact that Pantello is the Union's president.

In arguing that the Respondent had animus against Pantello's known and extensive union activity, the General Counsel offered the testimony of two witnesses: Pantello's uncle and Pantello's wife. The uncle testified that at a regular poker game in January, he asked Fetty if Pantello would be hired and Fetty told him no, because Pantello was a "troublemaker." Fetty denied the comment to Pantello's uncle.

And in 2001 (or early 2002), at the time Meridian acquired the plant, following which Pantello was not hired,² Fetty (who was then the production manager) told Pantello's wife (though they were not married at the time) "he had finally gotten the union out of the plant, which he had wanted to do for the last two years. . . ." Somewhat before that, Fetty, according to Pantello's wife, said that Pantello had said things to make people mad. Fetty was not asked about these statements to Pantello's wife, which tends to suggest that he made them. However, it is difficult to credit alleged statements that Fetty said he had finally gotten the union out of the plant since in fact the Union continued to represent the production employees. Further, the witness testified about an alleged event occurring 2 years before the Respondent acquired the plant and has an obvious stake in the outcome of this proceeding. While I do not credit her testimony, I conclude that even if true, the facts she testified to are irrelevant.

There is no evidence tending to disprove the testimony of Fetty and Dillard that Fetty was not involved in the decision not to offer Pantello a job or that this decision was made prior to Fetty himself being offered the position of plant manager. Thus it is difficult to accept the General Counsel's argument that whatever animus Fetty had toward Pantello (whether or not

² Pantello was ultimately hired, apparently through the grievance process, though such is not clear on the record.

because of Pantello's union activity) could be imputed to the Respondent.

Though there are credibility conflicts, particularly concerning the November incident, which I tend to resolve in favor of the Respondent's witnesses, even accepting Pantello's version I cannot conclude that he was not hired because of his union presidency.

First, there is no contention that when Pantello confronted Johnson (or talked to him in Pantello's version) that he was acting on behalf of the Union, in his capacity as president or otherwise in concert with other employees.

Most importantly, there is no evidence of union animus. The Union had represented employees of the plant since about 1944 and there is no suggestion that the relationship between the Respondent's various predecessors and Union was anything other than harmonious. While 44 grievances were filed in the previous 2 years, presumably by employees, such does not imply that Pantello was so aggressive a representative of employees that the Respondent would be motivated to deny him employment. Nor does this tend to prove he was the most active member of the Union. As far as this record shows, he had been the Union's president for some years, and participated in the Union's affairs as such. This does not imply unusual activism, or suggest a motive to single him out to be discriminated against.

Johnson testified that he was aware that if less than 50 percent of the employees hired had not been Meridian employees, the Respondent would not have to recognize the Union. In fact about 85 percent of those hired were Meridian employees, including the union vice president and other officers of the Union. Dillard had received some 80 applications from non-Meridian employees but interviewed only 15 and hired only 8. The Respondent has recognized the Union and is negotiating for a collective-bargaining agreement.³ There is no evidence that Pantello's activity as the union president (for instance in processing grievances) was a matter of concern to Meridian, the plant manager or, more importantly, to the Respondent.

Assuming Pantello was considered a "troublemaker" and said things to make people mad, such does not imply that these evaluations were based on Pantello's union or other protected

³ In a similar acquisition in Chicago, the Respondent hired about 90 percent of the predecessors employees and has recognized their bargaining representative, though not hiring the union's president. I reject the inference argued for by the Charging Party that the Respondent has a pattern to deny employment to the presidents of local unions of companies it acquires.

concerted activity. While "troublemaker" is sometimes a code word for "union activist" it can also be literal. In short, the General Counsel has offered no persuasive rationale for why the Respondent would single out Pantello to discriminate against because he was an officer of the Union. Finally, Pantello was not the only employee of Meridian not to be offered a job with the Respondent, yet he is the only one alleged to have been discriminated against.

In effect, the General Counsel argues that because Pantello was the Union's president, prima facie the Respondent's failure to hire him was unlawful. I do not agree that simply refusing to hire the president of the union representing a predecessor's employees makes out a prima facie case. The Charging Party cites *Champion Rivet Co.*, 314 NLRB 1097 (1994), wherein a successor company's failure to hire the union president and two other union activists was found unlawful. In that case, however, there was substantial evidence of union animus including the company's stated desire to operate nonunion as it did at other facilities. Such facts are simply not present here.

It may well be that the reason given for not hiring Pantello was trivial and in other contexts might lead to an inference that the true reason was his union activity; however, such an inference cannot be made in absence of some evidence that hiring decisionmaker had some union animus. Here such evidence is lacking.

I conclude that the evidence is insufficient to support a finding that the Respondent did not hire Pantello because of his union activity. Accordingly, I shall recommend that the complaint be dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The complaint is dismissed in its entirety.

Dated, San Francisco, California August 31, 2004

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.